No. 88-1986

Supreme Court, U.S.
FILED
JUN 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BORDEN, INC.,

Petitioner,

v.

AFFILIATED FM INSURANCE CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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—and—

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QUESTIONS PRESENTED

1. Whether the United States District Court and Court of Appeals for the Sixth Circuit exercising diversity jurisdiction are free to substitute their own judgment for that of Ohio's highest court in determining whether under Ohio law the insurance company's duty to defend is broader than its duty to indemnify?

2. Whether the principles set forth in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) and its progeny permit a federal court exercising diversity jurisdiction to hold identical words in the pollution exclusion of an insurance policy to be unambiguous as a matter of law when two intermediate Ohio appellate courts have held as a matter of law that those words are ambiguous?

3. Whether the court below should have certified questions of Ohio state law to the Supreme Court of Ohio?

4. Whether or not the standard pollution and premises alienated exclusions are applicable to this case as a matter of law?[1]

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[1] All parties to this case are listed in the caption to this Court. With respect to Rule 28.1 of the Rules of this Court, Borden, Inc. has no parent company, subsidiaries (except wholly-owned subsidiaries) or affiliates other than Master Limited Partnership. The Insurance Environmental Litigation Association and the American Petroleum Institute, Chemical Manufacturers Association, International Business Machines Corporation, The Lubrizol Corporation, Monsanto Company, NI Industries, Inc., Olin Corporation and United Technologies Corporation submitted amici curiae briefs in the Sixth Circuit.

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BORDEN, INC.,

Petitioner,

v.

AFFILIATED FM INSURANCE CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Borden, Inc. ("Borden") respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on January 10, 1989 and the denial of the petition for rehearing or rehearing *en banc* entered on March 7, 1989.

OPINIONS BELOW

The affirmance by the Court of Appeals for the Sixth Circuit is reported at 865 F.2d 1267. The per curiam opinion and order was not published, and is set forth as Appendix A to this Petition.

The order denying the petition for rehearing was not published, and is set forth as Appendix C to this Petition. The opinion of the United States District Court for the Southern District of Ohio is reported at 682 F. Supp. 927, and is set forth as Appendix B to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on January 10, 1989. A timely petition for rehearing with suggestion for rehearing *en banc* was denied by order dated March 7, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, Clause 1 of the United States Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls; —to Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party; —to Controversies between two or more States; —between a State and Citizens of another State; —between Citizens of different States; —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Section 1652 of Title 28, United States Code, provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

Petitioner seeks review of the decision of the Court of Appeals for the Sixth Circuit affirming the District Court's decision, which failed to follow *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), in granting the motion of respondent (there defendant) Affiliated FM Insurance Company ("Affiliated") for summary judgment dismissing Borden's declaratory judgment action for insurance coverage and denying Borden's motion for partial summary judgment on the duty to defend or pay defense costs.

1. *The Underlying Amoco Litigation*

In this declaratory judgment action, Borden sought to recover defense and indemnity costs from its insurance carrier, Affiliated. Affiliated refused to defend or indemnify Borden, as it was required to do by two excess liability policies it issued to Borden, in an underlying lawsuit brought by Amoco Oil Company ("Amoco") arising out of Amoco's purchase of property on which Borden had deposited phosphogypsum waste. The Amoco action claimed breach of contract and warranty, nuisance *per se* under Texas law, and that Borden bears liability under CERCLA for the waste. Borden successfully defended against all of Amoco's claims, including the CERCLA claim, at the trial level, and the case is on appeal.

2. *The Policies*

The policies at issue contain standard language widely utilized by the insurance industry. They provide that Affiliated agreed to indemnify Borden for any loss suffered by reason of liability imposed by law arising out of, *inter alia*, property damage "caused by an occurrence."[1] The policies further provide that Affiliated is required to defend any suit against Borden even if the suit is "groundless false or fraudulent."

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[1] An occurrence is defined as

> an accident *including continuous or repeated exposure to conditions* [resulting in] damage neither expected nor intended from the standpoint of the insured.

Despite these provisions, Affiliated refused to defend or indemnify Borden in the Amoco action, on the grounds, *inter alia*, that the pollution exclusion[2] and the premises alienated exclusion[3] applied.

3. *The Proceedings Below*

Borden initiated this declaratory judgment action in the Ohio Court of Common Pleas to determine its coverage under the policies. The action was removed by Affiliated to federal court, where Borden moved for partial summary judgment on Affiliated's duty to defend (e.g. Affiliated's duty to pay Borden's defense costs). Affiliated cross-moved for summary judgment, seeking dismissal of the complaint. The District Court recognized that Ohio law applied to the interpretation of the policies, and Borden's reliance on *Buckeye Union Insurance Co. v. Liberty Solvents & Chemical Co., Inc.*, 17 Ohio App. 3d 127, 477 N.E.2d 1227 (1984), but without citing any Ohio authority determined that the Ohio Supreme Court would not follow Ohio intermediate state court decisions finding the pollution exclusion ambiguous,

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[2] The pollution exclusion states that the policy shall not apply:

> to personal injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere, or any water course or body of water, but this exclusion does not apply if such discharge, dispersal, release or escape is sudden or accidental.

[3] The premises alienated exclusion states that "this policy shall not apply":

> (b) [U]nder Coverage 1(b) to injury or destruction of:
>
> (1) property owned by the insured;
>
> (2) any goods or products, including any container thereof, manufactured, sold, handled or distributed by the named insured, or by others trading under his name, or premises alienated by the named insured, arising out of such goods or products or premises or any part of such goods or products or premises.

and held the pollution exclusion unambiguously excluded indemnity. It then rejected the rulings of the Ohio Supreme Court, including *Willoughby Hills v. Cincinnati Insurance Co.*, 9 Ohio St. 3d 177, 459 N.E.2d 555, 558 (1984), that the duty to defend is broader than the duty to indemnify, and granted Affiliated's motion holding that since there was no duty to indemnify, there was no duty to defend.

The Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court in a one-page decision without citation of authority. Borden filed a timely Petition for Rehearing with Suggestion for Rehearing *en banc*, and suggested that if the federal court was inclined to reject well-established state court precedent, it should, at the very least, certify those questions of law to the Ohio Supreme Court for review. In a one page decision the Sixth Circuit stated that "the issues raised in the petition were fully considered in the original submission" despite the fact that the certification issue had not previously been raised.

REASONS FOR GRANTING THE WRIT

Insurance coverage and interpretations of insurance policies are matters governed by state law. There are presently many coverage cases pending in United States District Courts under diversity of citizenship jurisdiction.

The courts below, in violation of the *Erie* doctrine, decided this case in contravention of underlying state law.[4] A basic underlying premise of that doctrine is the sovereignty of the states, and a proper regard, under our federalist system, for state court resolutions of issues of state law. The *Erie* doctrine was designed to prevent a different result in the federal courts under diversity jurisdiction from the state courts with resepct to matters governed by state law. An outcome determinative result in the federal

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[4] Other federal courts have similarly declined to follow established state precedent in insurance coverage cases, encouraging litigants to engage in forum shopping and to litigate these state law claims in the federal courts. *See e.g., Continental Insurance Co. v. Northeastern Pharmaceutical and Chemical Co., Inc.*, 842 F.2d 977 (8th Cir. 1988) (*en banc*).

district courts will encourage unwarranted federal forum shopping and more frequent resort to the *federal* courts to resolve these issues of *state* law. This Court should accept certification and declare that federal courts cannot be used to obtain a different coverage result than state courts.

The Ohio Supreme Court has held that the duty of an insurance company to defend its policyholder is broader than its duty to indemnify. The insurance company must defend if the claim is "potentially or arguably" within the policy, even if ultimately there is found to be no duty to indemnify. *Willoughby Hills v. Cincinnati Insurance Co.*, 9 Ohio St. 3d 177, 459 N.E. 2d 555, 558 (1984). The District Court here reversed that inquiry, finding there was no duty to indemnify and, therefore, no duty to defend. In so doing, it failed to follow Ohio law. This abrogation of state supreme court precedent was in direct contravention of *Willoughby* – and consequently of *Erie*.

In holding that the standard pollution exclusion was unambiguous, the courts below again disregarded two recent Ohio intermediate appellate courts which held that this exclusion is ambiguous. *See Buckeye Union Insurance Co. v. Liberty Solvents & Chemicals Co., Inc.*, 17 Ohio App. 3d 127, 477 N.E. 2d 1227 (1984); *Kipin Industries, Inc. v. American Universal Insurance Co.*, 41 Ohio App. 3d 228, 535 N.E.2d 334 (1987), *motion to certify record overruled*, No. 87-1720 (Ohio Sup. Ct. Jan. 13, 1988). The *Kipin* court held that the pollution exclusion "must be construed strictly against the insurer because it is ambiguous in meaning," and reaffirmed *Buckeye*.[5]

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[5] The premises alienated exclusion also was held to preclude payment of Borden's defense costs. In the absence of Ohio authority on point the courts below rejected overwhelming non-Ohio authority holding that the exclusion was inapplicable. *See, e.g. Bankers Trust Co. v. Hartford Accident & Indemnity Co.*, 518 F. Supp. 371, *vacated on other grounds*, 621 F. Supp. 685 (S.D.N.Y. 1981) (owned property exclusion inapplicable where the policyholders' clean up measures necessary to prevent seepage to surrounding property); *Broadwell Realty Services, Inc. v. Fidelity & Casualty Co. of New York*, 218 N.J. Super 516, 528 A.2d 76 (App. Div. 1987); *P.H. Snook & Austin Furniture Co. v. Steiner & Emery*, 43 S.E. 775, 776 (Ga. 1903).

The courts below should have applied Ohio law even if they believed it was wrong. *West v. American Telephone & Telegraph*, 311 U.S. 223, 235-36 (1940). This is particularly true in light of the Ohio Supreme Court's refusal to review *Kipin*. Instead, in deciding the issues of state insurance law raised by this action, in clear violation of the *Erie* doctrine, they rejected state court interpretations of state law. This abrogation of state sovereignty and the dictates of federalism, if allowed to stand, will mean that the Ohio state court litigant will be bound by precedent holding that the duty to defend is broader than the duty to indemnify, and that the pollution exclusion is ambiguous, while the Ohio federal court diversity litigant will be bound by federal precedent holding *exactly* the opposite. This is the very result *Erie* was designed to prevent.

At the very least, if the Sixth Circuit had questions about how the Ohio Supreme Court would resolve an issue of state law previously addressed by the state's intermediate appellate courts, it should have utilized the recently adopted Ohio certification procedure, Rule XVI of the Ohio Rules of Civil Procedure, to request that the Ohio Supreme Court advise it with respect to that state's law. It should not and cannot decide on its own that the highest state court would reverse its own holding that the duty to defend is broader than the duty to indemnify, and reject intermediate appellate court decisions. Indeed, another panel of the Sixth Circuit has recognized certification to be the preferable means of resolving questions of state law. *See International Surplus Lines Insurance Co. v. Anderson Development Co.* (No. 87-2102) (court certifies a question of insurance coverage law to Michigan's highest court).

The net result of the decisions below is a blatant violation of the *Erie* doctrine amounting to legislation by the federal courts in an area that the constitution has reserved to state law. It cannot be allowed to stand.

CONCLUSION

For the reasons set forth herein, petitioner prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

NOT FOR PUBLICATION

87-4159

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BORDEN, INC.,

Plaintiff-Appellant,

v.

AFFILIATED FM INSURANCE COMPANY

Defendant-Appellee.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

On Appeal from the United States District Court for the Southern District of Ohio.

BEFORE: KEITH and KRUPANSKY, Circuit Judges; and ZATKOFF*

PER CURIAM: Plaintiff, Borden, Inc. ("Borden"), appeals from the order of the district court granting defendant Affiliated FM Insurance Company's ("Affiliated") motion for summary judgment in this action for a declaratory judgment that Affiliated is obligated to defend and indemnify Borden in an action filed against Borden by Amoco Oil Company. The district court held

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* Honorable Lawrence P. Zatkoff, United States District Court, Eastern District of Michigan, sitting by designation.

that the "premises alienated" exclusion and the pollution exclusion contained in the policy purchased from Affiliated by Borden precluded coverage. *Borden, Inc. v. Affiliated FM Insurance Co.*, No. C-2-85-809 (S.D. Ohio November 4, 1987).

We have reviewed the briefs and record submitted in this matter, and we have heard arguments from counsel. Upon review, we perceive no error in the resolution below. Accordingly, we AFFIRM the judgment of the district court based on the opinion filed on November 4, 1987 by the Honorable James L. Graham, Southern District of Ohio.

ISSUED AS MANDATE: March 23, 1989
COSTS: None

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

BORDEN, INC.,

Plaintiff,

v.

AFFILIATED FM INSURANCE COMPANY

Defendant.

Case No. C-2-85-809

DECISION AND ORDER

November 4, 1987

GRAHAM, D. J.

The plaintiff, Borden, Inc., is a New Jersey Corporation and has its principal place of business in Columbus, Ohio. The defendant, Affiliated F.M. Insurance Company ("Affiliated") is a Rhode Island Corporation and has its principal place of business in Johnston, Rhode Island. In 1974, plaintiff purchased a first layer excess liability policy from defendant. This policy provided for a $500,000 retained limit for which Borden was to be responsible. This coverage remained in effect until 1978.

On April 16, 1982, Amoco Oil Company filed a complaint against Borden in the United States District Court for the Southern District of Texas. The complaint alleged that Borden fraudulently concealed the presence of hazardous wastes on a

parcel of land in Texas sold by Borden to Amoco. This complaint was later amended to seek response costs under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §8601 *et seq*.

Borden notified Affiliated of Amoco's claims on March 6, 1984. Affiliated refused to defend Borden and asserted that Amoco had not alleged an "occurrence" under the policy, that the pollution and nuclear exclusions applied to the claims, and that Borden had not given timely notice of the claims. Affiliated later notified Borden that the premises alienated clause also precluded coverage.

Borden subsequently filed a complaint in the Court of Common Pleas of Franklin County, Ohio, seeking a declaratory judgment that Affiliated is obligated to defend and indemnify Borden in the Amoco action. On petition of the defendant, that action was removed to this Court pursuant to 28 U.S.C. §§1441 and 1446. This Court has jurisdiction by virtue of diversity of citizenship under 28 U.S.C. §1332.

This case is now before the Court upon the parties' cross-motions for summary judgment. The standard for granting summary judgment is set forth in Fed. R. Civ. P. 56(c) which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

In considering whether there is a genuine issue of material fact, the Court must inquire whether:

> A fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

> The [court's] inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict.

Anderson v. Liberty Lobby, 106 S.Ct. 2505, 2512 (1986). In making this inquiry, all evidence of the opposing party must be taken as true and all justifiable inferences are to be drawn in his favor. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-159 (1970). However, in ruling on a motion for summary judgment the Court must "view the evidence present through the prism of the substantive evidentiary burden" which the plaintiff must meet. *Anderson*, 106 S.Ct. at 2513. See also *Celotex Corp. v. Cathrett*, 477 U.S. 317 (1986).

In deciding a case founded on diversity of citizenship, a federal court must apply the law of the state in which it sits. *Erie Railroad Co. v. Tompkins*, 304. U.S. 64 (1938). This includes the conflict of laws rules of the forum state. *Klaxon Co. v. Stentor Electric Manufacturing Co., Inc.*, 313 U.S. 487, 496 (1941). In contracts cases, Ohio courts examine several factors to determine which state has the most significant relationship to the contract. These include the place of contracting, the place of negotiation, the place of performance, the situs of the subject matter, and the domicile of the parties. *Gries Sports Enterprises, Inc. v. Modell*, 15 Ohio St. 3d 284, 473 N.E.2d 807 (1984).

In the instant case, the insurance contracts were negotiated and entered into in Ohio. The place of performance and the subject matter were to be in all the states, including Ohio, where Borden conducts its operations. Borden has its principal place of business in Ohio, while Affiliated is located in Rhode Island. In light of these facts, the Court concludes that Ohio has the most significant relationship to the insurance contracts at issue.

Affiliated argues that coverage is precluded by the pollution exclusion contained in the policies. That exclusion states that the policy shall not apply:

> to personal injury or property damage arising out of the discharge, dispersal, release or escape of smoke,

> vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Affiliated asserts that this clause applies to Amoco's claims which allege that Borden deposited radioactive waste materials on the land which was sold to Amoco. Borden, on the other hand, contends that Amoco's allegations fall within the "sudden and accidental" exception to the exclusion.

Borden maintains that the release of pollutants is "sudden and accidental" unless both the discharge and the resulting harm were expected or intended by the insured. According to Borden, the words "sudden and accidental" are ambiguous and must be construed in favor of the policyholder. In support of its contention, Borden relies on *Buckeye Union Insurance Co. v. Liberty Solvants & Chemicals Co., Inc.*, 17 Ohio App. 3d 127, 477 N.E.2d 1227 (1984). That case held that where the insured did not intend the damage caused by hazardous wastes, the release could be considered "sudden and accidental" from the viewpoint of the insured.

Several cases from other jurisdictions also support Borden's position. In *Jackson Township Municipal Utilities Authority v. Hartford Accident & Indemnity Co.*, 186 N.J. Super. 156, 451 A.2d 990 (1982), the court held that only a manufacturer which continues polluting despite its knowledge of harmful effects will be excluded by the pollution clause. In the court's view, the pollution exclusion was simply a restatement of the definition of "occurrence." Other cases adopting this view include *Niagara County v. Utica Mutual Insurance Co.*, 80 A.D.2d 415, 439 N.Y.S.2d 538 (1980) and *United Pacific Insurance Co. v. Van's Westlake Union, Inc.*, 34 Wash. App. 708, 664 P.2d 1262 (1983).

This Court is not persuaded to adopt the approach of these courts. While the opinion of the Ohio Court of Appeals in *Buckeye* is entitled to some deference, it is not absolutely binding

on this Court. See *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967). This Court is convinced that the Ohio Supreme Court would not adopt the construction of the pollution exclusion set forth in *Buckeye*.

The Ohio Supreme Court has stated that:

> It is well-settled in Ohio that insurance policies should be enforced in accordance with their terms as are other written contracts. Where the provisions of the policy are clear and unambiguous, courts cannot enlarge the contract by implication so as to embrace an object distinct from that originally contemplated by the parties.

Rhoades v. Equitable Life Assurance Society, 54 Ohio St. 2d 45, 374 N.E.2d 643, 644 (1978). See also *Jackson v. Metropolitan Life Insurance Co.*, 34 Ohio St. 2d 138, 296 N.E.2d 679 (1973). Moreover, words in an insurance policy are to be given their commonly accepted meaning unless that would lead to an absurd result. *Olmstead v. Lumbermens Mutual Insurance Co.*, 22 Ohio St. 2d 212, 259 N.E.2d 123 (1970).

This Court does not find the pollution exclusion involved in this case to be ambiguous. The "sudden and accidental" exception expressly applies to the "discharge, dispersal, release or escape" of the pollutants, rather than to the harm caused by the pollutants. "Sudden," in its common usage, means "happening without previous notice or with very brief notice," while "accidental" means "occurring sometimes with unfortunate results by chance alone." Webster's Third New International Dictionary, (1968). The meaning of these terms is clear and should not be twisted simply to provide insurance coverage when the courts deem it desirable. See Note, *The Pollution Exclusion Clause Through the Looking Glass*, 74 Geo. L.J. 1237, 1240 (1986).

The Supreme Court of North Carolina has recognized the fallacy of reading the pollution exclusion as equivalent to the "occurrence" definition. *Waste Management v. Peerless Insurance Co.*, 315 N.C. 688, 340 S.E.2d 374 (1986). That court noted that

"[u]nlike the focus of the 'occurrence' language in the policies' broad coverage provisions, the focus of the 'pollution exclusion' is *not* upon intention, expectation, or even foresight." 340 N.E.2d at 380 (emphasis in original). Accordingly, the court held that the exclusion precluded coverage where the underlying complaint alleged that groundwater became contaminated due to the regular dumping of wastes by the insured.

Several other courts have held that the pollution exclusion applied to the release of wastes on a regular basis or in the ordinary course of business. In *Techalloy Co. v. Reliance Insurance Co.*, 487 A.2d 820 (Pa. Super. 1984), the court stated that where the complaint alleged discharges over a period of twenty-five years, there was no sudden and accidental event. Similarly, an Indiana court held that where the insured was aware that its pollution control system frequently malfunctioned, the emission of gases was not sudden and accidental. *Barmet of Indiana, Inc. v. Security Insurance Group*, 425 N.E.2d 201 (Ind. Ct. App. 1981). See also *Great Lakes Container Corp. v. National Union Fire Insurance Co.*, 727 F.2d 30 (1st Cir. 1984); *Fischer & Porter Co. v. Liberty Mutual Insurance Co.*, 656 F.Supp. 132 (E.D. Pa. 1986); *Transamerica Insurance Co. v. Sunnes*, 77 Or. App. 136, 711 P.2d 212 (1985).

In the case at bar, Amoco's complaint alleges that Borden regularly deposited radioactive wastes on its property as part of its production of phosphoric acid. Moreover, an officer of Borden has admitted that the company deposited phosphogypsum on the property from 1964 to 1970 and that the pile of phosphogypsum is 35 feet high and covers 30 to 40 acres. Rosenzweig affidavit at paragraphs 8 and 9. Clearly, this is not an allegation of a "sudden and accidental" event. Rather, it is precisely the type of activity which the pollution exclusion was drafted to preclude. See *Waste Management*, 340 S.E.2d at 381. The Court must give effect to the intent of both parties. Accordingly, the Court holds that the allegations in the Amoco complaint are within the pollution exclusion and, therefore, Affiliated has no contractual obligation to defend or indemnify Borden.

Affiliated also argues that coverage is precluded by the "premises alienated" exclusion. That provision states that the policy does not apply to "premises alienated by the named insured, arising out of such . . . premises or any part of such . . . premises." Affiliated maintains that this clause applies to Amoco's allegations, which concern a parcel of land sold by Borden to Amoco. Borden argues, on the other hand, that coverage is not precluded because Amoco claims damages for the pollution of the entire Texas City environment as well as to its own property.

Even if it had standing to do so, Amoco does not make any such claim. Its complaint is grounded solely on the alleged failure of Borden to disclose the presence of hazardous wastes on land which it conveyed to Amoco. Therefore, Borden's contention is without merit. Alternatively, Borden argues that the term "premises" refers only to buildings and not to land. In the law of property, however, "premises" means both land and buildings thereon. See Black's Law Dictionary (5th ed. 1979); *Wilmington Island Construction Co., Inc. v. Cincinnati Insurance Co.*, 179 Ga. App. 477, 347 S.E.2d 308 (1986).

The "premises alienated" exclusion is also unambiguous and clearly applies to the case at bar. As stated above, the Court must give effect to the clear meaning of a written contract and holds that the exclusion relieves Affiliated of any duty to defend or indemnify Borden. Since Affiliated is entitled to judgment on the basis of the pollution and premises alienated exclusions, the Court need not address its other contentions. Accordingly, plaintiff's motion for summary judgment is DENIED and defendant's motion for summary judgment is GRANTED.

Final judgment is rendered in favor of the defendant and the costs of this action are assessed against the plaintiff.

It is so ORDERED.

/S/ JAMES L. GRAHAM

United States District Judge

DATE: November 4, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

Borden Inc.

v.

Affiliated FM Insurance Co.

JUDGMENT IN A CIVIL CASE

CASE NUMER: C-2-85-0809

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED plaintiffs motion for summary judgment is DENIED, defendants motion for summary judgment is GRANTED, JUDGMENT is for the defendant costs assessed against the plaintiff.

Date: November 4, 1987

Clerk: KENNETH J. MURPHY

/s/Ben Robinson

(By) Deputy Clerk

APPENDIX C

No. 87-4159

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BORDEN, INC.,

Plaintiff-Appellant,

v.

AFFILIATED FM INSURANCE COMPANY

Defendant-Appellee.

Before

Keith and Krupansky, *Circuit Judges*
and Zatkoff*

March 7, 1989

ORDER

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

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* Honorable Lawrence P. Zatkoff sitting by designation from the Eastern District of Michigan.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/

Leonard Green, Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

BORDEN, INC.,

Plaintiff-Appellant,

v.

AFFILIATED FM INSURANCE COMPANY

Defendant-Appellee.

Case No. C-2-85-0809

JUDGMENT

November 4, 1987

This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED plaintiffs [sic] motion for summary judgment is DENIED, defendants [sic] motion for summary judgment is GRANTED, JUDGMENT is for the defendant costs assessed against the plaintiff.

November 4, 1987 — Kenneth J. Murphy

Date — Clerk

/s/ Bev Robinson

(By) Deputy Clerk

No. 88-1986

Supreme Court, U.S.
FILED
JUL 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1988

BORDEN, INC.

Petitioner,

v.

AFFILIATED FM INSURANCE COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a federal court exercising diversity jurisdiction is bound by the decisions of a state intermediate appellate court when determining how a state's highest court would rule on a matter of state law.[1]

[1] Pursuant to Rule 28.1, respondent, Affiliated FM Insurance Company, states that it has two parents: Allendale Mutual Insurance Company and Allendale Associates, Inc. It has no subsidiaries and no affiliate companies.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

Respondent Affiliated FM Insurance Company ("Affiliated") respectfully requests the Court to deny Petitioner Borden, Inc.'s ("Borden") request for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on January 10, 1989 and the denial of the petition for rehearing entered on March 7, 1989.

STATEMENT OF THE CASE

The Underlying Litigation

In April 1982, Amoco Oil Company ("Amoco") brought suit against Borden in the United States District Court for the Southern District of Texas as a result of Borden's sale to Amoco of real property containing a 35-feet high pile of

radioactive phosphogypsum waste covering some 30 to 40 acres. Radioactive phosphogypsum waste was a by-product of Borden's phosphoric acid manufacturing process. Borden has admitted that it placed the waste on the property during the regular course of its and its predecessor's business operations from the mid-1950's through 1970. Amoco claimed that Borden had fraudulently concealed the radioactive nature of the waste when it sold the property to Amoco in 1977. Amoco sued to rescind the sale, or otherwise to require Borden to bear the cost of removing the waste from the property.

Borden notified Affiliated of the Amoco suit in March 1984 and demanded, pursuant to Affiliated's alleged obligations under an umbrella excess liability insurance policy issued to Borden, that Affiliated indemnify Borden for any amounts it might be held liable to pay Amoco. Borden conducted its own defense of the action. In February 1985, shortly before trial, Borden demanded that Affiliated "participate" in the defense of the action.

The Affiliated Policy

The policy at issue requires Affiliated to indemnify Borden for its losses which arise out of personal injury or property damage caused by an "occurrence."[2] Specifically excluded from coverage under the policy's "pollution exclusion" are losses arising from the discharge of waste materials upon land. However, the exclusion does not bar coverage if the discharge is "sudden and accidental."[3] The policy also bars coverage for injury to premises "alienated" or sold by the

[2] In Affiliated's policy, "occurrence" is defined as "an accident including continuous or repeated exposure to conditions which results in damage neither expected nor intended from the standpoint of the insured."

[3] The "pollution exclusion" provides in relevant part that the policy *shall not apply*:

> to . . . property damage arising out of the discharge, dispersal, release or escape of . . . waste materials. . .upon land . . . , but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Borden's footnote 2 on page 4 of its Petition incorrectly quotes the exclusion as inapplicable if the discharge is either "sudden" *or* "accidental." In fact, the policy requires both elements to be proved in order to avoid the pollution exclusion.

insured when the injury arises out of the premises itself or any part thereof.[4]

The policy further requires Affiliated to defend Borden against any claim made against it, even if fraudulent, so long as the claim is covered by the policy. Thus, if there is no covered "occurrence" or if a specific exclusion bars coverage, there is no duty to defend the claim.

Borden's Claim Under the Policy

Borden claimed that because a count of Amoco's complaint sought recovery under CERCLA[5] for the costs of removing the phosphogypsum from the property, Affiliated's policy should cover any loss to Borden as "property damage." Affiliated disclaimed coverage for the Amoco claim for several reasons, including that both the "pollution exclusion" and the "premises alienated exclusion" barred coverage. Affiliated disclaimed any obligation to defend Borden, among other reasons because the policy did not cover the Amoco claim and, in any event, Borden had not requested Borden to defend the suit.

The Proceedings Below

In April 1985, Affiliated filed suit for declaratory judgment in the District Court of Galveston County, Texas. At about the same time, Borden filed suit for declaratory judgment in the Ohio Court of Common Pleas. Affiliated removed the action to the United States District Court for the Northern District of Ohio on the basis of the parties' diversity of citizenship[6] and voluntarily dismissed the Texas suit.

The parties filed cross-motions for summary judgment seeking a declaration of their respective rights and obligations

---

[4] The "premises alienated exclusion" provides in relevant part that the policy shall not apply to injury or destruction of:

> premises alienated by the named insured, arising out of such . . . premises or any part of such . . . premises.

[5] Comprehensive Environmental Recovery, Compensation and Liability Act of 1980, 42 U.S.C. § 8601 *et seq.*

[6] Borden is a New Jersey corporation with its principal place of business in Columbus, Ohio. Affiliated is a Rhode Island corporation with its principal place of business in Johnston, Rhode Island.

under the policy. The District Court granted Affiliated's motion and denied Borden's, holding that both the pollution and premises alienated exclusions precluded coverage under the Affiliated policy and that, therefore, there was neither a duty to indemnify nor a duty to defend Borden.

In granting Affiliated's motion, the District Court considered two decisions of the Ohio Court of Appeals which held that the pollution exclusion is ambiguous and, therefore, did not apply to preclude coverage. After reviewing related Ohio Supreme Court decisions, case law from other jurisdictions, scholarly works, and dictionary definitions, the District Court was "not persuaded to adopt the approach of" the Ohio Court of Appeals:

> While the opinion of the Ohio Court of Appeals in *Buckeye* is entitled to some deference, it is not absolutely binding on this Court. See *Commissioner v. Estate of Bosch*, 387 U.S. 482, 465 (1967). This Court is convinced that the Ohio Supreme Court would not adopt the construction of the pollution exclusion set forth in *Buckeye*.

Decision and Order, Appendix pp. B-4, 5.

The Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court without opinion. The Court of Appeals also denied Borden's petition for rehearing.

ARGUMENT OPPOSING CERTIORARI

Rule 17 of the Rules of the Supreme Court of the United States provides that "review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted *only when there are special and important reasons therefor.*" [Emphasis supplied.] The rule states in relevant part that the Supreme Court may grant review:

> When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, *or has decided a federal question in a way in conflict with applicable decisions of this Court.* [Emphasis supplied.]

Contrary to petitioner Borden's assertion, the Court of Appeals did not decide any question in a way which conflicts with a decision of this Court.

It has long been settled by this Court that federal courts exercising diversity jurisdiction must apply state law "whether the law of the state shall be declared by its Legislature in a statute or by *its highest court* in a decision . . ." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 822 (1938) (emphasis supplied). This Court has also established that "[w]here an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court *unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.*" *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 61 S. Ct. 179, 183 (1940) (emphasis supplied). Furthermore, this Court has held that:

> [W]hile the decrees of "lower state courts" should be "attributed some weight . . . the decision [is] not controlling . . ." where the highest court of the State has not spoken on the point. [Citations omitted.]

Commissioner of Internal Revenue v. Bosch, 387 U.S. 456, 87 S. Ct. 1776, 1782 (1967).

Consistent with the above long-standing decisions, the Sixth Circuit has ruled:

> If the highest court has not spoken, the federal court must ascertain from *all available data* what the state law is and apply it. The sources of data which may guide our inquiry include the decisional law of the Ohio Supreme Court *in analogous cases and relevant dicta in related cases*. . . . The decisional law of Ohio appellate courts . . . and Ohio trial courts . . . are accorded weight, although a federal court is not bound by lower court determinations *if convinced by other data* that the state's highest court would determine otherwise. . . . In addition, consideration may be given to positions expressed in restatement of law, . . . *law review commentaries*

> . . . *and decisions from other jurisdictions or the "majority" rule.*

Bailey v. V & O Press Co., Inc., 770 F.2d 601 (6th Cir.1985). [Emphasis supplied.]

In this case, the District Court fully considered the two decisions of the Ohio Court of Appeals. However, after surveying the cases on point throughout the country, consulting law reviews, other recent scholarly works, the dictionary definition of the words "sudden" and "accidental," and most importantly, related decisions of the Ohio Supreme Court, the District Court was persuaded "that the Ohio Supreme Court would not adopt the construction of the pollution exclusion set forth in *Buckeye*." Decision and Order, Appendix p. B-5. The district court specifically found:

> The Ohio Supreme Court has stated that:
>
> It is well-settled in Ohio that insurance policies should be enforced in accordance with their terms as are other written contracts. Where the provisions of the policy are clear and unambiguous, courts cannot enlarge the contract by implication so as to embrace an object distinct from that originally contemplated by the parties. *Rhoades v. Equitable Life Assurance Society*, 54 Ohio St. 2d 45, 374 N.E.2d 643, 644 (1978). See also *Jackson v. Metropolitan Life Insurance Co.*, 34 Ohio St. 2d 138, 296 N.E.2d 679 (1973). Moreover, words in an insurance policy are to be given their commonly accepted meaning unless that would lead to an absurd result. *Olmstead v. Lumbermens Mutual Insurance Co.*, 22 Ohio St. 2d 212, 259 N.E.2d 123 (1970).

Decision and Order, Appendix p. B-5.

Thus, consistent with the decision of the Sixth Circuit in *Bailey* and the decisions of this Court in *Erie, West,* and *Bosch,* the District Court declined to follow two Ohio Court of Appeals decisions in favor of more persuasive authority and the long-standing rules of construction set forth in related opinions of the Ohio Supreme Court. Upon review, the Sixth Circuit found that there had been no error. Ruling, Appendix p. A-2.

In its Petition to this Court, Borden wrongly states that the courts below substituted their own judgment for the judgment

of the Ohio Supreme Court in *Willoughby Hills v. Cincinnati Ins. Co.*, 9 Ohio St. 3d 177, 459 N.E.2d 555 (1984). In *Willoughby*, the court held that an insurance company must defend a suit if the claim is even "potentially or arguably" within the scope of the policy. The court below found that the claims made in the Amoco suit against Borden were plainly excluded from coverage "and, therefore, Affiliated has no contractual obligation to defend or indemnify Borden." Decision and Order, Appendix p. B-6. The court's holding that there was no duty to defend Borden was thus fully consistent with the decision in *Willoughby* because the claims were not "potentially or arguably" within the scope of the Affiliated policy.

There is, therefore, no need here for the Court to review this case for consistency with *Erie*. The District Court followed all relevant Ohio Supreme Court decisions and considered fully all lower court decisions on point. The court decided not to follow the lower court decisions, but only after careful analysis of the issues and review of all the relevant decisional law and scholarly works. That is precisely what this Court anticipated in *Erie* and set forth clearly in later related decisions.

Moreover, even if the Court were to grant review of the decision below and were ultimately to reverse those portions of the decision which were based upon an alleged violation of *Erie*, the outcome of the case would be the same. Borden admits in its Petition that there is an "absence of Ohio authority" construing the premises alienated exclusion, on which the court below also based its decision. Petition p. 6, n. 5. Since there is no Ohio law directly on point which the court below could have followed, it was entirely appropriate for the court to construe the exclusion in accordance with rules of construction set forth in related cases decided by the Ohio Supreme Court. Decision and Order, Appendix p. B-7. This Court should not be asked to devote its resources to deal with issues which will have no effect on the outcome of a case.

Borden further asserts in its Petition that the court below should have followed the "overwhelming non-Ohio authority" allegedly holding that the premises alienated exclusion is inapplicable in similar circumstances. Petition, p. 6, n. 5. Borden's position is untenable for two reasons. First, a federal court sitting in a diversity case is under no obligation to follow decisions from jurisdictions unrelated to the case. Second, the few reported cases construing the premises alienated exclusion support the decision below and hold that the exclusion unambiguously applies to preclude coverage for claims of damage to property which has been sold by the insured to a third party. *Rider v. Cherokee Insurance Co.*, 635 F. Supp. 699 (E.D. Pa. 1986); *Wilmington Island Construction Co. v. Cincinnati Ins. Co.*, 179 Ga. App. 477, 347 S.E. 2d 308 (1986). Those cases cited in Borden's Petition discuss the "owned property exclusion," not the "alienated premises exclusion," and hold only that where contamination on property owned by the insured damages or threatens to damage property owned by a third party, the "owned property exclusion" will not preclude coverage for the cost of cleaning up the contamination. This is quite different from the situation where contaminated property owned by the insured is transferred by sale or otherwise to a third party who then makes a claim against the insured for property damage to that very property. It is this latter situation, the very case presented by Amoco's claim against Borden, that the premises alienated exclusion was designed to cover.

Borden also requests the Court to review the Court of Appeals' failure to utilize "the recently adopted Ohio certification procedure, Rule XVI of the Ohio Rules of Civil Procedure, to request that the Ohio Supreme Court advise it with respect to that state's law." Petition, p. 7.[7] Rule XVI, Section 1 provides:

> The Supreme Court may, at its discretion, answer questions of law certified to it by the Supreme Court of the

[7] Only the Court of Appeals could have certified any question of law to the Ohio Supreme Court in this case because the Rule permitting the Ohio Supreme Court to answer questions of law certified to it by the federal courts was enacted effective July 15, 1988, months after the District Court had issued its Decision and Order.

> United States, a Court of Appeals of the United States, or a United States District Court. This rule may be invoked when the certifying court determines that, in a proceeding before it, there are questions of law of this state which may be determinative of the cause and as to which it appears to the certifying court there is no controlling precedent in the decisions of this Supreme Court.

It is clear from the language of the rule that it applies only to permit the Ohio Supreme Court to accept questions certified by a federal court. It does not, and cannot, be applied to require any federal court to certify a question of law to the Ohio Supreme Court. Such certification is purely a discretionary matter.

Moreover, Borden never even requested the Court of Appeals to consider certifying the question to the Ohio Supreme Court until after Borden's appeal had been denied. Now Borden asks this Court to devote its resources to review a discretionary matter which was never an issue below. The Court should not be asked to consider Borden's untimely request.

Finally, although not mentioned among Borden's *Reasons For Granting The Writ*, Borden lists as one of its *Questions Presented:*

> 4. Whether or not the standard pollution and premises alienated exclusions are applicable to this case as a matter of law?

Petition, p. i. However, these state insurance law questions raise the same kinds of state law issues that this Court has declined to review in the past. See, *e.g., Continental Insurance Co. v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 842 F.2d 977 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 66; *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703.

In sum, Borden has requested this Court to grant certiorari (1) to review questions of federal law which have long been settled or which have not been raised by the issues in dispute; (2) to review the Court of Appeals' failure to exercise a purely discretionary procedural power; and (3) to resolve insurance questions which are governed by state law. None of these requests is specifically delineated or even contemplated by Supreme Court Rule 17.

CONCLUSION

For all the foregoing reasons, Respondent Affiliated FM Insurance Company requests that this Petition for a Writ of Certiorari be denied.

Respectfully submitted,

AFFILIATED FM INSURANCE COMPANY

By:_____

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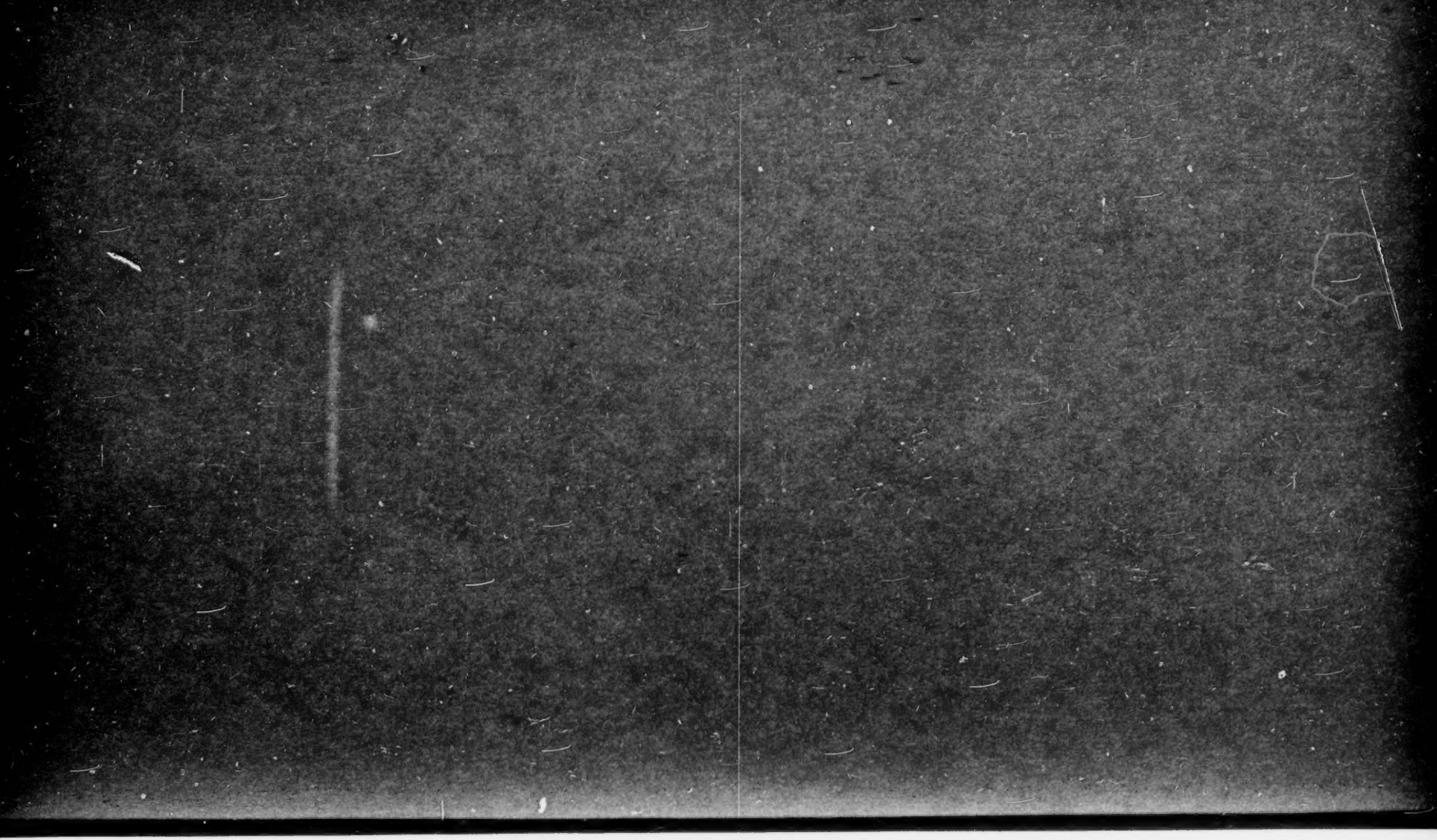

Supreme Court, U.S.
FILED
JUL 24 1989
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PETITIONER'S REPLY BRIEF IN FURTHER SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITIONER'S REPLY BRIEF IN FURTHER SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Borden, Inc. ("Borden") submits this reply brief in further support of its petition for a writ of certiorari to review a judgment of and the denial of a petition for rehearing by the United States Court of Appeals for the Sixth Circuit. In its opposition to the petition, Respondent Affiliated FM Insurance Company ("Affiliated") contends that no federal or constitutional question is raised by the petition here meriting this Court's review. Brief for Respondent at 9. Yet the Sixth Circuit's total abrogation of state court authority in a matter governed by state law requires this Court's review.

This Court has long recognized that the required deference to state decisions on matters of state law is of constitutional import. Indeed, the autonomy of the state courts to determine matters of state law lies at the very heart of our federalist system and is an essential element of state sovereignty. This Court long ago rejected the notion, enunciated in *Swift v. Tyson*, 41 U.S. 1 (1842), that the federal courts were free to abrogate such state sovereignty by imposing their own resolution of state law issues when sitting in diversity.

As noted by Justice Brandeis in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), this rejection was based on the *constitutionally* required deference to state law in state matters:

> The injustice and confusion incident to the doctrine of *Swift v. Tyson* have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction. Other legislative relief has been proposed. If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. *But the unconstitutionality of the course pursued has now been made clear, and compels us to do so.*

304 U.S. at 77-78 (footnotes omitted; emphasis added). Failure to defer to the state courts in such matters

> is, as Mr. Justice Holmes said, "an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." . . . We . . . declare that in [failing to show such deference] this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states.

304 U.S. at 79-80.

The federal invasion into state judicial autonomy is no less disruptive of the federalist system when the attack is on unchallenged state intermediate appellate precedent than when it is on a decision of the state's highest court. As Ohio permits no further appeal of the intermediate appellate precedents relied upon by Borden, except by discretionary review, which was rejected, the binding effect of these intermediate appellate decisions is mandatory. *Six Companies of California v. Joint Highway District No. 13*, 311 U.S. 180, 185-88 (1940) (reversing a Ninth Circuit decision on the grounds that it was contrary to unchallenged state appellate precedent); *see also Affiliated FM Insurance Co. v. Trane*, 831 F.2d 153, 155 (7th Cir. 1987) ("a federal court must apply the state law as declared by the highest state court *or otherwise by the intermediate appellate court of the state*. It has limited discretion to adopt untested legal theories brought under the rubric of state law.") (emphasis added).

In ignoring unanimous Ohio state appellate court precedent on the state law issues before it, the district court, upheld by the Sixth Circuit, failed to follow the constitutional dictates of *Erie*. While stating that such precedent was entitled to "some deference," it accorded *none* to the appellate decisions before it — indeed going so far as to omit any mention or citation of the most recent state precedent on these state law issues, *Kipin Industries, Inc. v. American Universal Insurance Co.*, 41 Ohio App.3d 228, 535 N.E.2d 234 (1987), *motion to certify record overruled*, No. 87-1720 (Ohio Sup. Ct. Jan. 13, 1988). While citing the decisions of *other* jurisdictions,[1] the Sixth Circuit failed to point to any evidence that the law of *Ohio* interpreting the pollution exclusion was other than stated in *Kipin*.

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[1] Significantly, while Respondent is willing to have the district court substitute the holdings of other states for Ohio's unchallenged appellate precedent on the pollution exclusion, it also would have the federal court *ignore* an overwhelming body of precedent from other states on the one issue *not* addressed by the Ohio Courts — the premises alienated exclusion, and the essentially identical own property exclusion. Respondent's Brief at 8.

This federal intrusion is particularly troubling in that the Ohio Supreme Court *specifically refused* to review the *Kipin* decision. Indeed, the Ohio Supreme Court's refusal to review *Kipin* provides overwhelming evidence that that decision correctly states the law of Ohio. The federal court was not free to substitute its own judgment of the law for that of the state appellate courts which the state's highest court has refused to disapprove.

Even were the federal court not bound by these unchallenged state precedents, a proper respect for the sovereignty of the state and the authority of its courts dictated that rather than impose its own view of state law, the federal court should have certified these questions to the Ohio Supreme Court. Indeed, another panel of the Sixth Circuit has recognized certification to be the proper procedure in such instances. *International Surplus Lines Insurance Co. v. Anderson Development Co.* (No. 87-2102). The recent case of *Claussen v. Aetna Casualty & Surety*, 865 F.2d 1217 (11th Cir. 1989), demonstrates conclusively that certification is to be preferred over blatant substitution of the federal court's judgment for that of the state.

Claussen involved the very question of state insurance law at issue here: is the pollution exclusion ambiguous? As here, the federal district court in *Claussen*, sitting in diversity, held that it was not. Unlike the Sixth Circuit, the Court of Appeals for the Eleventh Circuit certified the question of the proper interpretation of the clause to the Georgia Supreme Court. That court, like Ohio's intermediate appellate courts, held as a matter of state law that the clause was ambiguous. Because the Eleventh Circuit certified the issues in *Claussen*, the state's highest court was able to exercise its constitutional authority over state law. By rejecting state precedent and failing to refer to the Ohio Supreme Court the issues of state law presented herein, the Sixth Circuit has denied Ohio's courts their sovereign authority to decide state law issues.

It is no answer to note, as Respondent does, that in Ohio the certification rules do not *require* the federal courts to certify

such questions. This Court has not hesitated to review the discretionary exercise of jurisdiction by the federal courts in order to maintain the proper deference to state judicial authority. *See, e.g. Younger v. Harris*, 401 U.S. 37, 44 (1971) (requiring federal courts to abstain where necessary to insure that "the States and their institutions are left free to perform their separate functions in their separate ways"). Similarly, review by this Court is required here to reaffirm the *Erie* commitment to the sovereignty of state judicial authority.

CONCLUSION

For the reasons set forth herein, and in the prior petition, petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

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